Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

KEITH J THOMPSON,
Petitioner,

v.

NATIONAL RAILROAD PASSENGER CORPORATION,
Respondent

On Petition For Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Federal Railroad Administration (FRA), regulates and certifies all railroad Locomotive Engineers who operate trains on the general railroad system of transportation, specifically Amtrak engineers. FRA certified engineers must comply with railroad operating rules and timetable special instructions regarding railroad signal lights. Signal lights advise an engineer of track conditions ahead and specify at what speed a train may proceed. FRA Certification will be revoked if an engineer exceeds the authorized speed limits on tracks and through switches. In this case, government regulations require a locomotive engineer to report improperly displayed signal lights and unusual and unsafe track conditions immediately.

(1) If an engineer reports that an improperly displayed signal light had just caused their train to exceed the authorized speed limit, is their just cause for officials to dispute the report and discipline or fire the engineer for speeding?

(2) Will our National Homeland Security efforts to prevent a railroad related terrorist attack be compromised, if a railroad can fire or discipline a vigilant engineer who reports an improperly displayed signal light or other unusual, suspicious or unsafe condition that may affect the safety of the rail traveling public?

LIST OF PARTIES

The caption of the case in this Court contains the names of all parties to the proceeding in the Court of Appeals for the Ninth Circuit.

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Keith J Thompson, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The memorandum opinion of the Court of Appeals for the Ninth Circuit was entered on March 23, 2004, and is included in the Appendix at A. It is unpublished.

JURISDICTION

Petitioner seeks review from the judgment of the Court of Appeals for the Ninth Circuit entered on March 23, 2004. The Order denying petitioner's application for rehearing was entered on June 7, 2004. The honorable Justice O'Connor granted an extension of time to file the petition for a writ of certiorari on August 30, 2004 to and including October 5, 2004. Application No. 04A177. This Court has jurisdiction pursuant to 28 U.S.C. Section 1257(a)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution provides in Article VI, Clause 2: This Constitution, and the Laws of the United States ... shall be the supreme Law of the Land.

45 U.S.C. Section 20109, provides in pertinent part: Employee protections (a) Filing Complaints and Testifying.- A railroad carrier engaged in interstate or foreign commerce may not discharge or in any way discriminate against an employee because the employee, whether acting for the employee or as a representative, has- (1) filed a complaint or brought or caused to be brought a proceeding related to the enforcement of this part or, as applicable to railroad safety, chapter 51 or 57 of this title...

Section 205 of the Federal Railroad Safety Improvement Act, passed by the Senate, 108th CONGRESS 1st Session S. 1402 December 8, 2003 provides in pertinent part:

(b) RAIL SAFETY REGULATIONS-Section 20103(a) is amended to read as follows:

(a) REGULATIONS AND ORDERS - The Secretary of Transportation, as necessary, shall prescribe regulations and

(b) Issue orders for every area of railroad safety, including security, supplementing laws and regulations in effect on October 16, 1970. When prescribing a security regulation or issuing a security order that affects the safety of railroad operations, the Secretary of Homeland Security shall consult with the Secretary of Transportation.

STATEMENT OF THE CASE

Petitioner was an Amtrak Locomotive Engineer. I reported a signal light failure that mis-routed my train through a crossover onto another main track at a high rate of speed. My report was investigated. Amtrak denied any malfunction of the signal system and terminated my employment.

1. History of Railroad regulation to report defects in signals and tracks; Federal Locomotive Engineer Certification and prohibited conduct; Federal Railroad Safety Legislation and regulation

This case arises out of the discipline of locomotive engineers when they must report an improperly displayed signal light and track condition that caused their train to exceed the maximum authorized speed for a condition ahead. Signal lights regulate the speed that a train is authorized to go, up to the maximum authorized timetable speed for every track and location. Signal lights warn trains in advance to

stop for a condition ahead. Signal lights also warn trains to slow down if their train is being re-routed onto another track. Therefore, a failure of a signal to display the correct colored light for a condition ahead would on occasion, cause a train to exceed the maximum authorized speed. If engineers refrain from reporting defects in tracks and signals to avoid discipline, there remains a significant potential for accidents and collisions with tragic consequences.

Railroad General Code of Operating Rule 1.13 requires engineers to report by the first means of communication any accidents; personal injuries; defects in tracks, bridges, or signals; or any unusual condition that may affect the safe and efficient operation of the railroad. (See Rule 1.13, Appendix C 4) Railroad General Code of Operating Rule 5.15 requires Engineers must promptly report improperly displayed signals or absent fixed signals, flags, or signs to the train dispatcher. (See Rule 5.15 Appendix C 5) The Counsel of Safety for the FRA has stated that railroads must adhere to and follow the General Code of Operating Rules of which they have adopted. (See Appendix J)

Amtrak Locomotive Engineers operate the controls and safely move Amtrak passenger trains from one location to another over numerous miles of track controlled by signal lights.

Securing the United States rail system is a daunting challenge. In 2002, rail transit ridership in the United States totaled 3.4 billion trips. Federal Transit Administration, National Transit Database, 2002. Another 23 million passengers rode Amtrak. The terrorist bombing in Madrid has heightened concerns about the vulnerability of the rail system in the United States to terrorist attack. The transit system is intentionally barrier-free to handle large numbers of passengers efficiently and conveniently, but this characteristic makes transit more vulnerable to terrorist acts.

Increased vigilance is needed to secure public safety and reduce vulnerability. Senate Report 108-278 – RAIL SECURITY ACT OF 2004.

All Locomotive Engineers, including Amtrak engineers, who operate trains on the general railroad system in the United States must have a Federal Locomotive Engineer Certification. (CFR Title 49, Subpart A, Part 240.1, Appendix at C2)

Federal regulations outline specific Prohibited conduct by locomotive engineers: "After December 31, 1991, (a) It shall be unlawful to: (2) Operate a locomotive or train at a speed which exceeds the maximum authorized limit by at least 10 miles per hour." (Remaining text omitted, not applicable) (CFR Title 49, Subpart D, Part 240.305; Prohibited Conduct.) A Certified engineer who has failed to comply with railroad rules and practices regarding limitations of train speed shall have their certification revoked. (Id at 240.117, Appendix at C3)

The railroad investigated my report, disputed the failure of the signal system and charged me with a federal violation of speeding and fired me.

2. Proceedings and Decisions Below

This case involves the termination of petitioner's employment after reporting that a failed signal light had caused Respondent's Amtrak passenger train to speed onto another track placing the passengers in immediate danger of a collision.

On January 5, 1996, at approx. 10:06am, I made a safety stop of my Amtrak passenger train to report to the train dispatcher that a signal malfunction had caused my train to

be switched to another main line track, without warning, at a high rate of speed due to an improperly displayed signal light. The signal light, that we received, did not authorize our train to be on that main track.

I requested that the defect be investigated. I also reported that the signal defect had caused my train to go through a 35mph crossover at over 60mph. A Manager of Operating Practices was riding the locomotive at the time of the incident. (Dispatcher incident report, Appendix at E1) The Manager of Operating Practices on my locomotive saw the signals malfunction and reported the incident to his office in Seattle, Washington with his cell phone. (Interoffice memo, Appendix at F 1) The Burlington Northern Santa Fe (BNSF) Railroad owns the tracks and signals that my Amtrak train was using at the time of the incident. A signal supervisor was sent to my location to pull the signal tapes, which record the color of a signal. The dispatcher's report stated that dependent on the reading of the signal tapes, the Manager of Operating Practices and I may be Drug and Alcohol Tested. (Appendix at E 1) The signal supervisor read the tapes on location and reported that tapes indicated that the signal displayed the correct color. Based on that information, I was taken to Swedish Hospital in Seattle for U/A testing. Id. After being drug tested, Amtrak took me to their office and suspended my engineer certification for speeding pending a formal investigation. (Appendix at D) This act converted my safety report into a railroad discipline issue, which constrained me to a mandatory administrative appeal process through the Railway Labor Act. (See Title 45 153 (q), Appendix at C 1)

The FRA requires that a railroad hearing be held on disciplinary matters that conform to procedures outlined in the employee collective bargaining agreement.

After an agreed delay, Amtrak held a formal hearing on May 30, 1996 regarding the suspension of my federal engineer certification. Amtrak ruled that I was guilty of violating Railroad Operating Rules. (See Appendix H 1) Amtrak immediately terminated my employment.

I appealed that decision to the National Mediation Board, Special Board of Adjustment 928; a special Board created through the NMB to hear claims between Amtrak and the Brotherhood of Locomotive Engineers Union. A person aggrieved by the decision of the NMB can appeal their case for review before the district court within two years of the date of the decision. (App at C 1) On October 8, 1999, I filed my pro se petition for review in district court, within the time required, but had made a pro se error in naming the tribunal, National Mediation Board (NMB) as defendant instead of my employer, Amtrak. (Appendix at I) The court allowed me to amend my Complaint to name Amtrak as the correct defendant and immediately dismissed the NMB. Amtrak received my Amended Complaint and claimed that they did not have knowledge of my Complaint within the statute of limitations. Arguments confined to the statute limitations dominated the court proceedings until March 23, 2004 when a Ninth Circuit oral Panel concluded by ruling in Amtrak's favor. (Appendix at A) My appeal for en banc rehearing was denied on June 7, 2004. (Appendix at B) This petition ensued.

REASONS FOR GRANTING THIS PETITION

I plead my case before this court for two primary reasons listed in your "Guide for Prospective Indigent Petitioners for Writs of Certiorari" under "Nature of Supreme Court Review; (1) My case relates to the "Primary concern of the Supreme Court" which is "to decide cases presenting

issues of importance beyond the particular facts and parties involved" (2) "Another consideration is the importance to the public of the issue".

(1) FEDERAL RAILROAD REGULATION PROHIBITING SPEEDING IS IN CONFLICT WITH ANOTHER RULE TO REPORT DEFECTS IN SIGNALS

Speeding is a disciplinary issue; reporting a dangerous track condition or improperly displayed railroad signal light is a safety issue. This rule and regulation function properly as stand-alone issues; dangerous conditions are reported to prevent accidents and engineers are disciplined for failure to comply with established speed limits. Conflict arises when they occur concurrently because signal lights regulate the speed at which a train is authorized to proceed. Therefore, occasion arises when an improperly displayed signal light(s) fail to provide warning for trains to slow down for a condition ahead thus causing the train to exceed the maximum authorized speed. This creates a paradox of impossibility for the engineer who wants to report this type of dangerous signal and track condition. This is because the engineer's Federal Certification can be revoked if he reports the underlying issue of speeding. If a railroad acquires information that convinces the railroad that a person no longer meets the qualification requirements, their certification shall be revoked. (See CFR 49 Part 240.307 at appendix C 3) Speeding requires the revocation of certification. This regulation makes no exception as to how the railroad acquired the information relating to a violation.

Since the regulation provides no protection to the person making the report, any engineer who chooses to comply with the Operating Rule to report a defect has placed him or herself at the mercy of the railroad investigation that

will immediately follow. If the railroad company claims that their initial investigation into the report has provided them with reliable information to dispute the safety defect portion of the engineer's report that the signal system had failed to display the correct color, the engineer is then left to face their employer with the remaining portion of their report, a stand-alone issue of speeding. This requires the immediate suspension of his or her engineer certification, pending a formal hearing to determine possible revocation. CFR 49 Part 240.307 relevant part states:

(b) Pending a revocation determination under this section, the railroad shall: (1) Upon receipt of reliable information indicating the person's lack of qualification under this part, immediately suspend the person's certificate. Although no formal hearing has taken place; the engineer who reported the defect, must be immediately relieved of their duties and Drug tested.

Part 240.307 at (i) (1) states that a railroad shall not revoke a person's certification if sufficient evidence exists to establish that an intervening cause prevented or materially impaired the locomotive engineer's ability to comply with the railroad operating rule which constitutes a violation of Part 240.117(e)(1) through (e)(5) of this part. (See Part 240.117 at Appendix C 3) Part 240.117 includes a de-certification for a speeding violation. The provision is still deficient in that it provides no guaranteed protection for an engineer who reports speeding that occurred as a result of a signal and/or track defect. The provision still leaves the engineer at the mercy of the railroad to subjectively decide if sufficient evidence exists to reverse the suspension. Due to railroad liability issues, an engineer's chance that the railroad would excuse the speeding violation is not likely to occur. Therefore, the provision is completely deficient to protect an

engineer from being disciplined after they report a dangerous defect, which caused them to speed.

A locomotive engineer who stops their train to report a dangerous life-threatening defect on behalf of the passengers, to prevent a possible accident, should never fear that the railroad investigation into their report could be turned into a disciplinary issue subjecting them to a judicial appeal process through the Railway Labor Act. Such is the case in this petition before the Court.

This petition should be granted because there is no provision in the FRA regulations or railroad Operating Rules to eliminate a speeding violation when an improperly displayed signal light directly caused it.

THE RAIL TRAVELING PUBLIC IS IN DANGER BECAUSE ENGINEER'S REPORTS OF SIGNAL & TRACK DEFECTS ARE INVESTIGATED AS DISCIPLINARY ACTIONS IF ANY PORTION OF THAT REPORT INVOLVED SPEEDING

The risk of discipline or termination discourages engineers from reporting this type of incident. This endangers the traveling public. If a signal light(s) mis-routes an engineer's train onto a different track inconsistent with the signal light, an immediate corrective action of stopping the train and reporting the incident will trigger a disciplinary investigation against the engineer for speeding if the defect is contested. In the field, when this occurs, the engineer has no knowledge of if the signal light is pointing to the intended route or if the switch is pointing to the intended route. If no accident or damage resulted from the defect, an engineer may choose to proceed on the track they were switched to and take the chance that the dispatcher had intended the train to actually go down that track and decide that the signal light

system in the field had just mal-functioned and set the lights for their train to go down a different track, but this is very dangerous for the passengers on board. At that moment in time, the engineer must make a choice between passenger and crew safety or their career. If the track ahead is clear, the engineer has avoided a risky disciplinary investigation that could cost him or her their employment. If the engineer stops the train and reports the signal failure and speeding, and requests that it be investigated, they have substantially reduced or eliminated the safety risk to the traveling public and crew on board of a collision, but still must face a forceful disciplinary investigation.

The occurrence described above actually occurred. I chose public safety over my career and reported the incident. In doing so, I faced an immediate and forceful disciplinary action against me by the BNSF railroad that owns the tracks and signals. This was followed by Amtrak's investigation and endorsement of those charges. My safety report on behalf of the passengers on board cost me my lifetime career of 14 years as a locomotive engineer.

On January 5, 1996, I was working as the engineer of an Amtrak passenger train with 180+ passengers on board. My train was operating on Burlington Northern Santa Fe (BNSF) tracks. Our top speed, where permitted, was 79mph. Sitting next to me was, Joseph Z. Albinger, a BNSF Railroad Manager of Operating Practices (MOP) with 25 years experience. . (Appendix at E 1 & F 1) These two documents were exhibits at Amtrak's hearing and in the Record of Proceedings reviewed by the National Mediation Board. These documents are in the district court record as Dkt. # 16 filed in Expando. This portion of the railroad consisted of two main tracks side by side. After stopping at a station to discharge passengers, we passed a green signal light. Id. This green signal indicated that we would not be changing tracks

at the next signal and could continue at the maximum track speed permitted for that location. After going around a 60mph curve, we could see the next signal about ¼ mile away. Although we could not see the position of the switch from that far away, we could see the signal. It was a green light over a red light. (Appendix at F 1 paragraph 1 & 2). This color combination indicated that the switches ahead were set for our train to continue straight ahead on our track consistent with the green light we had previously received. Therefore, I started to increase the speed of our train toward 65mph, the speed limit for a train at that location. As the switch came into view, I saw that the crossover switch was wrong and was set for us to change tracks. I alerted the MOP, and we held on as our train went through the 35mph crossover at over 60mph and entered the other main line. Although our train had passed through the crossover without incident, our train and passengers were in immediate danger of being struck head-on by any trains coming at us on that track. I immediately brought the train to a stop and called the dispatcher to report the incident as required. (See Rule 1.1.3 & 5.15, Appendix C 3 & 4) The time was 10:06 am (See Appendix at E 1) The Manager of Operating Practices immediately grabbed his cell phone and called ahead to his office in Seattle to report the signal failure. (See Inter-Office memo at paragraph 2, Appendix F 1) This MOP held a high position of considerable authority and credibility with the BNSF Railroad unlike myself. It is not out of the ordinary for someone in his capacity to offer official rulings on whether or not a rule violation occurred. In addition to holding a high position as a BNSF Manager of Operating Practices, Mr. Albinger was a certified engineer and supervisor of locomotive engineers under FRA Part 240.105. (Appendix at C 2) Seattle was approximately 90 miles away. Mr. Tom White in Seattle received Mr. Albinger's

cell phone call. Mr. White immediately notified James M. Abby, Manager of CTC Quality Assurance, in the building who began to dispatch signal department personnel and others to the scene. Mr. Abby then contacted the dispatcher's office in Fort Worth and ordered the train dispatcher to not use any of the switches or signals in the area. The time was 10:10am. (Inter-Office memo paragraph 2& 3, Appendix at F 1)

My train was in a remote place. The record shows that the first management personnel could not reach my location to begin an investigation into our report of the signal failure and speeding for at least 1 hour and 15 minutes. (Appendix F 2 at paragraph 1)

During this time, while railroad officials were in route to investigate the signal failure, preparations for disciplinary action against Mr. Albinger (MOP) and myself had begun.

The train dispatcher's office incident report states that "the crew is being relieved and dependent on the reading of the signal tapes, the crew and Mr. Albinger may be Drug and Alcohol Tested. (Appendix at E 1) This tape, records the color of a signal light. The signal tape recorder was attached to the first signal we passed after discharging passengers. Although the reading of the signal tapes could not take place for over one more hour until railroad signal department managers could arrive on the scene, Mr. Abby, Manager of CTC Quality Assurance, and the train dispatcher's office, already had made plans to relieve me from my duties and have both of us Drug tested.

Since I reported to the dispatcher that the signal failure had also caused our train to speed through the crossover, the BNSF Railroad immediately dispatched a Trainmaster to my location to pull the speed tape off my locomotive. (Appendix at E 1 under information needed)

The speed tape is in a sealed "black box" located under the floor on every locomotive. Similar to the airlines, it records train speed and other functions. The speed tape would provide the BNSF Railroad with tangible evidence to charge me with a federal speeding violation. This speed tape was not capable of recording a problem with the signal light system along the tracks. Since no accident, injuries, or property damage was involved, it was requested to be pulled strictly for disciplinary purposes entirely based on my engineer's report of a signal failure by radio to the dispatcher.

I had reported the signal failure at 10:10am. The BNSF Railroad notified my employer, Amtrak at 10:45am PST about 40 minutes later. (Appendix at E 3 last entry) Amtrak was notified for two reasons, (1) To advise Amtrak officials of the incident and (2) The BNSF railroad was making preparations for a federal disciplinary action against me by having me be removed from the property and Drug and Alcohol tested, therefore Amtrak needed to dispatch a new engineer and crew to my location. (Appendix at E 1, Narrative) All of the preceding disciplinary investigative actions against me took place before any personnel could reach our remote location.

Although Amtrak was not notified until 10:45am, 40 minutes after I reported the signal failure; they began their disciplinary action against me at 10:10am. This was only four minutes after I reported the signal failure to the BNSF Railroad. BNSF records show that Amtrak's replacement crew did not arrive at our remote location until 15:05 (PT). This was 5 hours later. (Appendix at F 3 second paragraph line 3) During this entire time, I was at the controls on my Amtrak train. Although my total time on duty, under federal law that day was 11 hours and 5 minutes; Amtrak cut me off their payroll system at 10:10am, January 5, 1996, the moment I called the dispatcher to report the signal failure.

I received 2 hours and 5 minutes pay for the entire day. (See Appendix at G 1) That was the last wage I ever received from Amtrak because they terminated my employment. Therefore, Amtrak had begun to willfully and severely discipline me the moment I called the dispatcher to report the defect. For 5 hours, I was at the controls and operating the radio, as the engineer of an Amtrak passenger train with 180+ passengers on board at a remote location and considered off-duty and off the payroll by Amtrak. When officials arrived the scene, the MOP was primarily off the locomotive speaking to other managers while I remained alone at the controls on the locomotive until the relief crew arrived. Federal and Amtrak Safety Rules require that someone remain "on duty" and at the controls of train while passengers are on board. Amtrak further considered me off duty and off the payroll as I was being transported 90 miles to a Hospital to be Drug Tested and subsequently taken to their Amtrak's office where they suspended my engineer certification. (Appendix at D) Beyond the monitory discipline of cutting me off their payroll at 10:10am; claiming me "off duty" during this entire time is a serious violation of the Federal Hours of Service disclosures required by Federal regulations. This discipline was willful because Amtrak was in possession of my timeslip where I had claimed 11:05 minutes on duty in the Federal disclosure box as required by law. Furthermore, Amtrak preempted their monitory discipline to 10:10am, based on information they had received from the BNSF Railroad as to when I report the signal failure. Monetary discipline was reflected on my paycheck the very next week, yet Amtrak's formal investigative hearing to develop the charges was not scheduled until May 30, 1996, nearly 5 months later. (Appendix at H 1)

All of the disciplinary actions described above beset any Amtrak engineer who is concerned about the safety of the traveling public and proactively reports a defect in the signal system and concurrently reports that the defect caused speeding to occur. This discipline will beset the engineer, even if the report is co-reported by and with the credibility of a Manager of Operating Practices evaluating their performance at the time of the incident.

The traveling public is in danger because engineers will refrain from making these types of safety reports, if possible, to avoid enduring this type of discipline and investigation.

ALL OF THE LOWER COURT DECISIONS TO DISMISS MY CASE SHOULD BE OVERTURNED ON BEHALF OF PUBLIC SAFETY

As previously described, my report of a dangerous life-threatening condition should have remained a stand-alone safety report because an investigation into my report was not forthcoming because; (1) No accident, property damage, or injuries had occurred. (2) The railroad was unaware of the dangerous condition that had occurred, so consequently; there was no reason or means for management to accuse me of violating any rules. To the contrary, it was management personnel on my locomotive that advised other railroad officials that my Amtrak train was in a dangerous situation and on a wrong track due to a signal failure. (Appendix F 1)

My case entered district court as an appeal for a review of a National Mediation Board decision upholding the termination of my employment by Amtrak. (Title 45,U.S.C.A. 153, (q) App. C 1) In my original complaint, filed in district court, I wrote," My case was not within the

scope of the boards jurisdiction to review because it was not a labor discipline issue". (Appendix at I) The National Mediation Board finding was based upon an investigation that should have never occurred. My case was a safety issue whereby employees' are required by the General Code of Operating Rules to report defects in railroad signals to the train dispatcher by the first available means of communication." Id. Therefore, I have only presented factual statements relating to the persons who reported the defect; the Manager of Operating Practices and myself, and written statements relating to those who received the report by radio and phone. This is consistent with the questions I presented for review. Although it is within the scope of the Boards jurisdiction to review railroad labor disputes involving employee discipline consistent with procedures outlined in an employee's collective bargaining agreement, it is not within the scope of the NMB to review railroad Operating Rules safety reports regarding defects.

All of the lower court decisions to dismiss my case were confined to issues relating to the statute of limitations to correct my pro se error in naming the wrong defendant. (Appendix at A 1) Although my argument was substantial enough to earn me one remand to the district court and an oral argument on my second Ninth Circuit Appeal, my petition questions before this court is not to re-argue that decision. My petition is to seek a ruling that protects a person(s) who report and request an investigation into a dangerous life-threatening railroad condition that endangers the traveling public. The ruling I pursue, would prohibit a railroad from disciplining an engineer who initiates a safety report that caused another violation to occur.

The lower court decisions to dismiss my case, and the NMB decision upholding the termination of my employment should both be overturned because (1) the lower courts were

unable to review my original complaint because of issues relating to my pro se error in naming the wrong defendant and (2) my case should have never became a disciplinary issue that obligated me to a judicial appeal thorough the Railway Labor Act.

Without a ruling on this issue and a court ordered overturning of Amtrak's termination of my employment, engineers, both passenger and freight, will continue to refrain from reporting any dangerous, suspicious, or unusual condition(s) that may trigger an investigation that may cost them their career. A ruling is urgently needed so railroad engineers can be free to play a vital and unrestricted part in protecting America and the rail traveling public.

This writ of Certiorari should be granted because this issue is of interest to the entire rail traveling public and will have a direct effect on their safety and desire to travel or commute rail.

NATIONAL SECURITY

Most urgently, the leading issue facing our nation today is public safety and how to prevent another terrorist attack here at home. Government officials have repeatedly addressed the extreme vulnerability of railroads; especially a rail related terrorist attack similar to that which devastated Spain. This danger was presented to the Senate on May 21, 2004, as Senate Report 108-278 – RAIL SECURITY ACT OF 2004; REPORT OF THE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION on S. 2273. Bill states, "The purpose of S. 2273 is to improve rail security by requiring the completion of a vulnerability assessment and security plan for the rail system, and by authorizing funds to address immediate security needs." The Bill also states, "Primary regulatory jurisdiction over rail

security rests with the Department of Homeland Security, (DHS), while jurisdiction over rail safety rests with the Federal Railroad Administration (FRA)." My petition before this Court is relevant to the issues presented in this Bill because my petition directly relates to a dangerous conflict in FRA regulations that has substantially increased the vulnerability of our rail system.

Legislation has been introduced to seek an additional $777 million to pay for railroad tunnel safety improvements, including $40 million for the Amtrak tunnel running under the Supreme Court and Capitol Hill offices to Union Station. Railroad signals and switches directly affect the safety of trains traveling through these tunnels. An un-reported defect or unusual occurrence involving the signal lights or switches that direct trains through these tunnels could have tragic circumstances. Therefore, a review of the issues presented in this petition is of public interest and is urgently needed, so Amtrak engineers will be protected and not fear employment discipline for reporting improperly displayed signal lights or other unusual conditions.

Senator Joseph R. Biden Jr., Delaware Democrat, was quoted in THE WASHINGTON TIMES as saying, "The harsh truth is that our passenger rail system is far from safe and unless we do something about it and do it quickly, we could suffer a similar or even worse fate." This Court's review of the issues described in my petition; the resending of the termination of my employment with Amtrak, and a necessary guarantee in the FRA regulations or other laws to restrict railroads from disciplining engineers for issues arising out of a safety report of a dangerous track and/or signal condition will substantially improve the safety of the traveling public and set a precedent for all other Locomotive Engineers at a time when our nation desperately needs it. Additionally, this added security protection would bring thousands of locomotive engineers into the fold of providing

a higher level of vigilance of our rail systems at no additional costs to the federal government or the Department of Homeland Security.

Allowing the conflict in federal regulation and Operating Rule to report defects in tracks and signals creates a huge preventable gap in our National Security. Although our Nation has excellent intelligence, they cannot monitor every mile of passenger train tracks, switches and signals. Locomotive Engineers will always be the first line of defense to become aware of an unusual condition. Our Intelligence and Homeland Security can only speculate and rely on tips on how a terrorist may act and increase security accordingly, but nobody really knows. It has been said by elected officials that better public vigilance could head off an attack. Any illicit alteration or deception of a signal color displayed for a passenger train, or any unlawful tampering with the position of switches could result in a horrible disaster.

The Eastern U.S. has the highest concentration of passenger and commuter trains and these trains operate up to 150mph. This Amtrak policy of disciplining engineer for the conditions described in this petition poses the greatest danger to passengers traveling by train in the East Coast region of the U.S. where Anxiety has been running high after Sept 11.

A decision to stop a train and report a dangerous condition must be done quickly and immediately to avert or reduce the potential for disaster. Similar to an airline pilot, an Amtrak engineer shoulders the responsibility for the life and safety of every passenger in every seat on that train. Unless Amtrak engineers and other engineers have the freedom to comply with the Railroad Safety Rule of reporting defect in signals, tracks and other unusual conditions that may affect the safety of the train without penalty, they will fine reason to refrain from or delay reporting such incidents. Immediate corrective action by the engineer when a train has been

mis-routed onto another track could protect a train from being led into not only another train, but possibly being led into a pre-arranged set up for a terrorist act to occur.

The official railroad documents in my case, and the testimony provided within this petition describe a chilling aspect of what happens to an engineer who reports that their train has been mis-routed.

There have been numerous news reports of train passengers, especially in the Eastern U.S., who have reported unusual behavior on board trains, found notes with terror threats in restrooms, or have viewed and reported other unusual conditions on trains or around railroad facilities and have seen and experienced prompt police action and train delays as the incidents were investigated. Generally, after numerous hours of investigation, nothing has been found although the safe course was taken on behalf of the traveling public. In either case, no charges or accusations were filed against the vigilant citizen who made the report. What the rail traveling public does not know is that the circumstances are the opposite for the engineer driving their train who is watching the tracks, signals and switches ahead. Those circumstances are the reason for this writ of certiorari before this Court.

CONCLUSION

In the interests of public safety and national security against terrorism, this Court's intervention is desperately needed.

The petition for a writ of certiorari should be granted.

Respectfully submitted this 5th day of October, 2004

By:_____

Keith J Thompson
Petitioner, Pro Se
1280 125th Lane NE # C9
Kirkland, WA 98034
(425) 823-0118

APPENDIX

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
MAR 23 2004
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

KEITH J. THOMPSON,

Plaintiff – Appellant,

v.

NATIONAL RAILROAD PASSENGER CORPORATION,

Defendant – Appellee

No. 03-35024

. C.No. CV-99-01616-RSL

MEMORANDUM*

Appeal from the United States District Court
For the Western District of Washington
Robert S. Lasnik, District Judge, Presiding

Argued and Submitted March 4, 2004
Seattle, Washington

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

Before O'SCANNLAIN, RYMER, and BYBEE, Circuit Judges.

Keith J. Thompson appeals the district court's order dismissing as untimely his action brought under the Railway Labor Act, 45 U.S.C. 153 First (q), seeking judicial review of an arbitrator's decision upholding his firing by the National Railroad Passenger Corporation ("Amtrak").

Thompson contends his amended complaint naming Amtrak as a defendant should relate back to the date of his timely-filed original complaint. But Thompson did not establish that Amtrak had notice of his action within 120 days of the filing of the original complaint, or that Amtrak knew or should have known that Thompson had mistakenly failed to name Amtrak as a defendant. See Fed. R. Civ. P. 15(c).

The record does not support Thompson's contention that Amtrak and the National Mediation Board are "so closely related in their business operations or other activities that the institution of an action against one serves to provide notice of the litigation to the other." G.F. Co. v. Pan Ocean Shipping Co., 23 F.3d 1498, 1503 (9th Cir. 1994) (internal quotation omitted).

AFFIRMED.

B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
JUN 7 2004
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

KEITH J. THOMPSON,

Plaintiff – Appellant,

v.

NATIONAL RAILROAD PASSENGER CORPORATION,

Defendant – Appellee

No. 03-35024

D.C. No. CV-99-01616-RSL
Western District of Washington,

ORDER

Before O'SCANNLAIN, RYMER, and BYBEE, Circuit Judges.

The panel has voted unanimously to deny the petitions for panel and en banc rehearing.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. 35.

The petition for rehearing and petition for rehearing en banc are therefore

DENIED

45 U.S.C. 153 First (q)

If any employee or group of employees, or any carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms of an award or by the failure of the division to include certain terms in such award, then such employee or group of employees or carrier may file in any United States district court in which a petition under paragraph (p) could be filed, a petition for review of the division's order. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Adjustment Board. The Adjustment Board shall file in the court the record of the proceedings on which it based its action. The court shall have jurisdiction to affirm the order of the division or to set it aside, in whole or in part, or it may remand the proceeding to the division for such further action as it may direct. (Remaining text omitted)

45 U.S.C. 153 First (r)

All actions at law based upon the provisions of this section shall be begun within two years from the time the cause of action accrues under the award of the division of the Adjustment Board, and not after.

CFR Title 49 Part 217

217.1 Purpose.

Through the requirements of this part, the Federal Railroad Administration learns the condition of operating rules and practices with respect to trains and other rolling equipment in the railroad industry, and each railroad is required to instruct its employees in operating practices.

217.3 Application

(a) Except as provided in paragraph (b) of this section, this part applies to railroads that operate trains or other rolling equipment on standard gage track which is part of the general railroad system of transportation

CFR Title 49 Part 240
Qualification and Certification of Locomotive Engineers

Part 240.1 Purpose and scope.

(a) The purpose of this part is to ensure that only qualified persons operate a locomotive or train.

(b) This part prescribes minimum Federal safety standards for the eligibility, training, testing, certification and monitoring of all locomotive engineers to whom it applies. This part does not restrict a railroad from adopting and enforcing additional or more stringent requirements not inconsistent with this part.

(c) The qualifications for locomotive engineers prescribed in this part are pertinent to any person who operates a locomotive, unless that person is specifically excluded by a provision of this part, regardless of the fact that a person may have a job classification title other than that of locomotive engineer.

Part 240.105 Criteria for selection of designated supervisors of locomotive engineers.

(b) The railroad shall examine any person it is considering for qualifications as a supervisor of locomotive engineers to determine that he or she: (1) Knows and understands the requirements of this part; (2) Can appropriately test and

evaluate the knowledge and skill of locomotive engineers; (3) Has the necessary supervisory experience to prescribe appropriate remedial action for any noted deficiencies in the training, knowledge, or skills of a person seeking to obtain or retain certification; and (4) Is a certified engineer who is qualified on the physical characteristics of the portion of the railroad on which that person will perform the duties of a Designated Supervisor of Locomotive Engineers.

Part 240.117 Criteria for consideration of operating rules compliance data.

(c)(1) A certified engineer who has demonstrated a failure to comply, as described in paragraph (e) of this section, with railroad rules and practices for the safe operation of trains shall have his or her certification revoked.

(e) A railroad shall only consider violations of its operating rules and practices that involve: (2) Failure to adhere to limitations concerning train speed when the speed at which the train was operated exceeds the maximum authorized limit by at least 10 miles per hour. (Remaining text omitted – not relevant)

Part 240.307 Revocation of certification.

(a) Except as provided for in 240.119(e), a railroad that certifies or recertifies a person as a qualified locomotive engineer and during the period that certification is valid, acquires information which convinces the railroad that the person no longer meets the qualification

requirements of this part, shall revoke the person's certificate as a qualified locomotive engineer.

(12) The railroad shall have the burden of proving that the locomotive engineer's conduct was not in compliance with the applicable railroad operating rule or practice or part 219 of this chapter.

(d) A hearing required by this section which is conducted in a manner that conforms procedurally to the applicable collective bargaining agreement shall be deemed to satisfy the procedural requirements of this section.

(i) A railroad: (1) Shall not determine that the person failed to meet the qualification requirements of this part and shall not revoke the person's certification as provided for in paragraph (a) of this section if sufficient evidence exists to establish that an intervening cause prevented or materially impaired the locomotive engineer's ability to comply with the railroad operating rule or practice which constitutes a violation under Part 240.117(e)(1) through (e)(5) of this part; or… (Remaining numbered text omitted – not relevant.)

General Code of Operating Rules

1.1.3 Accidents, Injuries, and Defects

Report by the first means of communication any accidents; personal injuries; defects in tracks, bridges, or signals; or any unusual condition that may affect the safe and efficient operation of the railroad. Where required, furnish a written report promptly after reporting the incident.

1.15 Improperly Displayed Signals

If a signal is improperly displayed, or a signal, flag, or sign is absent from the place it is usually shown, regard the signal as showing the most restrictive indication it can give. ...

D

Amtrak

NATIONAL RAILROAD PASSENGER CORPORATION
NOTIFICATION OF CERTIFICATION SUSPENSION

Social Security Number: XXX-XX-XXXX
Name (Last)(First)(Mi): Thompson Keith J
Certificate Number: 1451

You are hereby notified that your Locomotive Engineer Certification is SUSPENDED. This action is being taken based upon information that you have participated in conducted prohibited by FRA 49 CFR Part 240 as indicated below.

(Other options not selected are omitted for brevity)

√ Incident(s) involving noncompliance with the railroad's operating rules by operation of a locomotive or train at a speed, which exceeds the maximum authorized limit.

Your certification will remain suspended until investigation into the above indicated incident(s) and a revocation decision is made. The law provides that you are entitled to a hearing on the revocation before an officer other than the charging officer.

Employee Name (Type or Print)
KEITH J THOMPSON
Employee Signature ***s/ Keith J Thompson*** **Date** ***1/5/96***

Supervisor Name (Type or Print)
E. L. Quicksall
Supervisor Signature ***s/ E. L. Quicksall*** **Date** ***1/5/96***

E 1

FORT WORTH NETWORK OPERATIONS CENTER
INCIDENT REPORT

CAUSE: CODE DESCRIP.

Brief Narrative of Incident:

AMTRAK 1796 radioed the Trick Dispatcher advising they were on Main Track 1 and had a Clear Proceed signal indication and had gone through a Crossover at Ostrander onto Main Track 2 at approximately 60MPH and that they did not receive signal indication that they would be diverging through the Crossover. Nothing was derailed and there were no personal injuries. The authorized speed over the Crossover is 35MPH. Mr. Joseph Z. Albinger, BNSF's Manager Operating Practices, was riding the leading locomotive of this train at the time of the incident. The Signal Supervisor is en route to pull signal tapes. The crew is being relieved and, dependent upon the reading of the signal tapes, the crew and Mr. Albinger may be Drug and Alcohol Tested. The crew was taken to Swedish Hospital in Seattle for U/A testing.

Notification

Time	**Person**	**Information needed**
	R.O.C.	
1006-PST	Chief Dispr.	
Trainmaster		**Initial call, description of what Happened, speed tape, crew interview.**
	Roadmaster	
	Divn. Supt.	
	Divn.	

Rdmstr.

Yes Corr.Supt. Rod Allred, notified by Chf Dispr.

Yes Corr. GST. Bill Grimstad, notified by Chf Dispr.

Yes Corr. VP Herb Robinson, notified by WRG.

Yes Signal Desk Notified by Chief Dispatcher.
234-6137 **Signal readouts**

1230-PST M/W Desk Brian Olson **Recent track work in area, location of needed resources for restoring service**
234-6260

Mech. Desk Latest inspection reports
234-6258 on train

Crew Mgmnt. Crew call sheets, call and lay off history for crew.

Yes Perf. Evaluator Black, Notified by Chf Dispatcher
234-7260 Track Warrants, Bulletins, copy of train sheet, tape of phone and radio ckts, and crew efficiency tests results.

NTSB/FRA Report # **Person taking Report**
800-424-0201

State

DOT/EPA_____

ForeignLine_____

Bill Gaulding, Damage Prevention, Topeka, KS

(813) 435-342 Call him on all Major incidents, Burlington Lines only, esp. when Transloading is required, per Kevin Spradlln.

Other_____

1045-PST NOC Psgr Svc Dennis Loonan: notified by D.J.

Mitchell.

Philadelphia was notified by Mr. Loonan.

F 1

BURLINGTON NORTHERN RAILROAD

Date: January 5, 1996

To: Tom McMurray
Denny Boll
Neil Snooderly

From: James M. Abby

Subject: Alleged False Clear Ostrander, Washington Centralia South Dispatcher

At 1010(pt) I was informed that Amtrak 1796 was stopped just north of the plant at Ostrander and had a Green approach on main 2 at Sig 96.2 and then had a Green over Red at the 2N signal at the Ostrander plant. They then found themselves on Main 1 north of the plant after they had diverged through the number two crossover.

My notification was from Mr. Tom White in the building here at Seattle who had the Manager Operating Practices on the phone. The MOP was on his cellular and was on the headend of 1796 and was the one who saw the signals, and reported the signals as stated above.

I notified Fort Worth to make sure that we held the train pending signal department interview of the crew and MOP and that no signals or switches were to be used at Ostrander or at the surrounding plants towards Ostrander.

I then tried contacting the Signal Inspector and Signal Supervisor. The Signal Inspector was the first to call in and directed him to the site and to talk with the train crew. Signal

Supervisor was then the next to call in but he was an hour and half to 2 hours away, but was now in route. I then contacted the Manager Signal Quality who was in Vancouver and he is also in route with an ETA of an hour to hour 15 mins.

I then talked again with the signal inspector after his interview which verified the original report of Green at the approach to Green over Red at the plant and then crossed over to main one. I then instructed the Inspector to make a visual inspection of the signals, switches and relays to see if anything was amiss and to take ground readings. He later reported back that there were no grounds and that his visual inspection showed nothing out of the ordinary. I then instructed him to wait until his Signal Supervisor or the Manager Signal Quality arrive before any further testing is done.

INTEROFFICE MEMO

At 1136 hours the Signal Inspector called back into say he had talked the train crew on the 53-866 they had been stopped northbound on Main one at Ostrander due to a red signal. They saw the signal for main 2 set Red over Green for the diverging route and realized they were going to wait for another train to run around them and prepared to give them a roll by. But they do verify that the signal was for the diverging route Red over Green.

I also reviewed the data logger from Fort Worth and the route requested and the route indicated are for the diverging movement northbound main two to main one over number two crossover reverse. No exceptions noted on the logger.

Signal Supervisor Althauser, interviews the MOP and is also told that the approach signal 96.2 was Green and the 2N signal at Ostrander was Green over Red.

Signal 96.2 has a recorder in it and Signal Supervisor and Manager Signal Quality arrived at the approach signal to download the data from this recorder. After downloading and correlating the times with the office data logger we were able to verify that the approach signal at 96.2 was FLASHING YELLOW prior to and when Amtrak 1796 went by.

Further testing of the plant could not be accomplished until 1796 was moved from its present location north of Ostrander. At 1505(PT) the new crew arrived and the train was again on its way. At 1510 (PT) signal department commenced testing and verified colors in the plant and at the approach...no exceptions noted. Rocked the heads to simulate a problem and all circuits worked as intended and dropped the signal and sticking the stuck mech checks plus indicating a problem into the office.. so once again no exceptions noted. Then with the FY signal at 96.2 they rocked the head and all circuits worked as intended and recorded properly..so once more no exceptions noted. We then lined the plant main two to main two northbound and verified the proper colors and did some switch tests as if it had moved after being lined and all circuits worked as intended placing signal to stop...so again no exceptions noted.

All tests were completed by 1541 (PT), Dispatcher and Corridor Supt were notified and the first signal to untie the knot of trains was set at Ostrander at 1555 (PT)

At least 13 trains including 3 Amtraks were delayed.

If any further information is needed please contact me at home 206 774 0131 or on my cellular at 206 660 8432

Jim Abby

INTEROFFICE MEMO

ALL
ABORD
AMTRAK

NATIONAL RAILROAD PASSENGER CORPORATION
STATEMENT OF EARNINGS AND DENIALS

THOMPSON, KEITH J
0XXXXXXXXX SEA4A

(Columns omitted for brevity; REC TYPE; LABOR CAT; JOB CODE; COMPUTED DOLLARS; RATE)

	EARNINGS		
WORK DATE	REPORTED HOURS	DOLLARS	TRAIN
960104	05:40	114.69	0751
960104	02:20	47.23	0751
960105	02:05	42.17	0750
960105	05:55	0.00	0750
960109	00:00	0.00	
TOTAL	16:00	204.09	
DENIALS			
960105	05:55	0.00	075
960105	05:15	0.00	075
960105	00:00	0.00	075
TOTAL	11:05	0.00	
TOTAL DENIALS			
960105	09:55	0.00	
960105	00:00	0.00	
TOTAL	09:55	0.00	

H 1

National Railroad Passenger Corporation, Law Department, 800 N. Alameda Street, Los Angeles, California, 90012

Amtrak®

Certified Mail # P 191 288 877

June 6, 1996

Mr. Keith J. Thompson
12323 N.E. 131st Court #E103
Kirkland, WA 98034

Dear Mr. Thompson:

As a result of a Formal Investigation held on May 30. 1996, it was determined that you were in violation of Rule 9.1.6 and 9.1.9 as specified in the BN System Special Instructions, Number 3, addressed to all Subdivisions, dated April 2, 1995 and violation of the BN Pacific Division Timetable Number 3, dated April 2, 1995.

It was found that you crossed over from main 2 to main 1 at dual control turnout Ostrander, Washington in excess of the maximum authorized speed of 35 mph. Your action was taken after passing signal 96.2 at Rocky Point, displaying "approach medium" and signal at Ostrander Turnout displaying a diverging indication.

This is in violation of FRA 49 CFR part 240.307. Consequently the appropriate revocation period will apply.

Sincerely,

s / Carlos R. Hernandez
Carlos R. Hernandez
Hearing Officer
Western Region

CRH/1c

cc: K. G. Laird
H. R. Clark, BLE-RRR P 191 288 876
D. Scott
E. Quicksall

I 1

__FILED__ENTERED
__LODGED__RECEIVED
OCT 08 1999 MR
AT SEATTLE
CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
BY DEPUTY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

Keith J Thompson
Kirkland, Washington

Case No.

Planitiff,

Vs.

C99 – 1616L

National Mediation Board,
Special Board of Adjustment No. 928
Washington DC 20572-0002

COMPLAINT

Defendant

The Plaintiff's name and address is as follows:

Keith J Thompson 12423 NE 131ct # E103
Kirkland, Washington 98034 (425) 823-0118

The Defendant's name and address is as follows:

National Mediation Board, Special Board of Adjustment No. 928 1301 Kst NW suite 250E Washington DC 20572-0002

(202) 692-5000
Director of Arbitration Services, Roland Watkins

The Plaintiff alleges as follows:

1. Jurisdiction is conferred upon the Court by: Title 45, U.S.C.A. 153,(G) – Time limitation: Title 45, Chapter 8, Section 153, First (r) supra
2. I, Plaintiff, am a resident of King County, Washington.
3. I claimed for the recinding of discipline imposed of "Termination from service effective immediately" as stated in a decision letter dated June 6, 1996. Claim included, restoration to service with seniority and vacation rights unimpaired, with full compensation for time lost, full credit toward vacation entitlement and health and welfare benefits during the period held out of work.
4. My claim was denied, and I exhausted the administrative appeals process through the Railway Labor Act without success.
5. The Decision of the Defendant that I, the Plaintiff, had a fair and unprejustice trial and review is an erroneous abuse of the boards powers.
6. My case was not within the scope of the boards jurisdiction to review because it was not a labor or discipline issue. It was a safety issue whereby employees' are required by the General Code of Operating Rules to report defects in railroad signals to the train dispatcher by the first available means of communication. Title 45 USCS, 441 (Protection and rights of employees) prohibits my discharge. If I had failed to stop the train and report the failure and an accident occurred, I would be personally charged with "contributory negligence. It is not a violation of the rules to report an unsafe condition

and ask that it be investigated. Furthermore, when the board did review my case, the Chairman and Company Member disregarded the fact that my right to Due Process was violated by Amtrak's Hearing Officer during the investigation when all of the material facts, documents and testimonies were being adduced.

7. The demand for judgment and relief to which I am entitled is $270,000. This covers lost wages and benefits inclusive. This amount will be adjusted to reflect the actual length of time I am held out of service.

s/ *Keith J Thompson*
Keith J Thompson

US Department
Of Transportation

400 Seventh St., S.W.
Washington, D.C. 20590

Federal Railroad

Administration

January 30, 2001

Mr. Keith J. Thompson
12433 NE 131 ct # E103
Kirkland, WA 98034

Dear Mr. Thompson:

Thank you for your recent letter to the Federal Railroad Administration (FRA) seeking information on the General Code of Operating Rules (GCOR). In your letter, you posed a number of questions concerning the history and implementation of the GCOR and the linkage (if any) of the GCOR to the Railway Labor Act (RLA).

The GCOR is a "private authority" written by the individual railroads that have adopted it as their general system of operating rules. FRA plays no role in developing the GCOR. However, FRA has promulgated regulations found in the Code of Federal Regulations (C.F.R.) at 49 C.F.R. Part 217 that require railroads to develop and adhere to operating rules. Where a railroad has chosen to use the GCOR as its operating rules, FRA will require the entity to follow the GCOR.

FRA does not enforce the RLA and therefore, it would be inappropriate for me to opine on any connection that may exist between the GCOR and the RLA. Most likely, a private

attorney who specializes in RLA work could answer your questions.

I hope you find this information helpful.

Sincerely,

S/ Christine Beyer
Christine Beyer
Deputy Assistant Chief
Counsel for Safety

Supreme Court, U.S.
FILED
04 691 OCT -5 [redacted]

No. _____

In The

Supreme Court of the United States

KEITH J THOMPSON,
Petitioner,

v.

NATIONAL RAILROAD PASSENGER CORPORATION,
Respondent

On Petition For Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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SUPPLEMENTAL APPENDIX

Keith J Thompson
Petitioner, Pro Se
12224 NE 130th Way #J104
Kirkland, WA 98034
(425) 823-0118

SUPPLEMENTAL APPENDIX

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Order Granting Motion to Dismiss

A 1

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

KEITH J. THOMPSON,

Plaintiff,

Case No. C99-1616L

v.

NATIONAL RAILROAD PASSENGER CORPORATION,

Defendant.

REPORT AND RECOMMENDATION

I. INTRODUCTION AND SUMMARY CONCLUSION

Plaintiff seeks review of an arbitration award issued by the Special Board of Adjustment No. 928 ("SBA") on October 14, 1997, upholding Plaintiff's discharge on June 6, 1996, by his former employer the National Railroad Passenger Corporation ("Amtrak"). He appeals the decision by the SBA No. 928 under the Railway Labor Act ("RLA"). 45 U.S.C. 151 et. seq.

Plaintiff filed his initial complaint on October 8,1999, against the National Mediation Board ("NMB") and SBA No. 928. (Dkt. # 1). The NMB on behalf of itself and SBA No. 928 filed a motion to dismiss. (Dkt. # 10). Plaintiff then filed a motion to amend his complaint to name Amtrak as the defendant in lieu of the NMB and SBA No. 928. (Dkt. # 14). On June 6, 2000, this Court permitted the Plaintiff to amend

his complaint. (Dkt.# 21). Plaintiff filed his amended complaint against Amtrak on July 21, 2000 (Dkt. # 26), seeking to set aside the award issued by SBA No. 928 that upheld the termination of his employment with Amtrak ("Award").

This case is before the Court on Amtrak's motion to dismiss Plaintiff's amended complaint pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6) for lack of subject matter jurisdiction and failure to state a claim upon which relief may be granted. Alternatively, Amtrak moves for summary judgment.

This Court recommends that Defendant's motion to dismiss be granted because Plaintiff's Amended Complaint is barred by the statute of limitations. Should the District Court agree with this recommendation, the four pending discovery motions filed by Plaintiff should be stricken as moot.

II. DISCUSSION

A. Standard of Review.

On a motion for judgment on the pleadings pursuant to Rule 12, the court accepts all of the material allegations in a plaintiff's amended complaint as true and construes the allegations in the light most favorable to the nonmoving party. See Jenkins v. McKeithen, 395 U.S. 411, 421 (1969); Oscar v. University Students Co-op Ass'n, 965 F.2d 783, 785 (9th Cir. 1992). The court may not consider materials outside the complaint and the pleadings. See Cooper v. Pickett, 137 F.3d 616, 622 (9th Cir. 1997).

A motion for judgment on the pleadings only admits, for the purposes of the motion, all well-pleaded facts in the amended complaint, as distinguished from conclusory allegations. See Mitchell v. King, 537 F.2d 385, 386 (10th

Cir. 1976); see also Jones v. Community Redevelopment Agency, 733 F.2d 646, 649 (9th Cir. 1984) (conclusory allegations unsupported by facts are insufficient to state a claim under 1983). "Dismissal can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." Balistreri v. Pacifica Police Dept., 901 F.2d 696, 699 (9th Cir. 1988). Because Plaintiff is proceeding pro se in this matter, he is entitled to a liberal construction of his amended complaint. See Ferdik v. Bonzelet, 963 F.2d 1258, 1261 (9th Cir. 1992), cert. Denied, 506 U.S. 915 (1992).

B. Plaintiff's Claims against Amtrak are Barred by the Statute of Limitations.

Plaintiff's claims under 45 U.S.C. 153 fail to state a claim upon which relief may be granted because his amended complaint against Amtrak is barred by the two-year statute of limitations:

> All actions at law based upon the provisions of this section shall be begun within two years from the time the cause of action accrues under the award of the division of the Adjustment Board, and not after.

45 U.S.C. 153 First (r). A cause of action accrues under an award of a special board of adjustment on the date it is rendered. See Transportation Communications Int'l Union v. CSX Transportation, Inc., 30 F. 3d, 903, 905 (7th Cir. 1994). SBA No. 928 rendered its Award on Plaintiff's claim on October 14, 1997. Therefore any claim challenging SBA No. 928's Award filed after October 14, 1999, is barred by the statute of limitations. Plaintiff's Amended Complaint, which named Amtrak as Defendant, was filed on July 21, 2000.

C. Plaintiff's Claims Against Amtrak do not Relate Back Under Rule 15(c)(3).

Plaintiff's claims against Amtrak do not relate back to the date of his original pleading, filed October 8, 1999, against the NMB and SBA No. 928. See Fed. R. Civ. P. 15(c)(3). Whether an amendment that attempts to bring in a new party will relate back to the date of the original pleading depends on four factors: (1) the claim must have arisen out of the conduct set forth in the original pleading; (2) the party to be added must have received such notice that it will not be prejudiced in maintaining its defense; (3) the party to be added must or should have known that, but for a mistake concerning identity, the action would have been brought against it; and, (4) the second and third requirements must have been fulfilled within the prescribed limitations period. Schiavone v. Fortune, 477 U.S. 21, 29 (1986). All four of these factors must be satisfied. Id.

The Court need not decide whether the first three factors have been satisfied because a review of the record makes clear that the fourth factor has not been satisfied. The fourth factor requires that the notice provisions contained in the second and third factors be satisfied within the prescribed limitations period. Amtrak had no knowledge of the action against it, within the two-year statute of limitations. (Dkt. # 57 at 8). As noted above, the claim against Amtrak in this action was first presented to the Court in Plaintiff's Amended Complaint filed on July 21, 2000. (Dkt. # 24). Thus, prior to July 21, 2000, no one had notice of the claim against Amtrak. Therefore Plaintiff cannot be permitted to pursue his claim against Amtrak because Amtrak could not have been on notice of the claim until July 21, 2000, at the earliest, more than nine months after the statute of limitations expired.

III. CONCLUSION

This Court recommends that Defendant's motion to dismiss be granted because Plaintiff's complaint is barred by the statute of limitations. Should the District court agree with this recommendation, the four pending discovery motions filed by Plaintiff should be stricken as moot. (Dkt. ## 47, 51, 56, and 63). A Proposed Order accompanies this Report and Recommendation.

DATED this day 27 of June, 2001.

s/ M J Benton
MONICA J. BENTON
United States Magistrate Judge

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AUG 13 2001
AT SEATTLE
CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
BY DEPUTY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

KEITH J. THOMPSON,

Plaintiff,

Case No. C99-1616L

v.

NATIONAL RAILROAD PASSENGER CORPORATION,

Defendant.

ORDER ADOPTING REPORT AND RECOMMENDATION

This Court has reviewed the Report and Recommendation of United States Magistrate Judge Monica J. Benton and adopts the report and recommendation that defendant National Railroad Passenger Corporation's ("Amtrak's") motion to dismiss be granted for the reasons explained below.

Amtrak's motion to dismiss is premised on the argument that plaintiff Keith J. Thompson's

("Thompson's") action is barred by the following statute of limitations:

> All actions at law based upon the provisions of this section shall be begun within two years from the time the cause of action accrues under the award of the division of the Adjustment Board, and not after.

45 U.S.C. 153, First (r). It is clear that Thompson's action accrued on October 14, 1997, the date of the award of a special board of adjustment. He thereafter realized that the proper defendant was not the National Mediation Board but Amtrak. He then filed a motion to amend his complaint to name Amtrak as the defendant, which was granted on June 6, 2000. Thompson filed an amended complaint with Amtrak as the named defendant on July 21, 2000.

Amtrak argues that Thompson's amended complaint must be dismissed because it was filed on July 21, 2000, more that two years and seven months after the October 14, 1997 date of accrual. It also argues that his amended complaint does not relate back under Fed. R. Civ. P. 15(c) because Amtrak had no knowledge of the lawsuit.

Thompson first argues that this issue has already been addressed by the Court. He asserts that the Court granted his leave to amend and therefore resolved any doubt that the lawsuit could go forward against the proper defendant. He also argues that 45 U.S.C. 153 First (r) applies to the filing of the action rather than the naming of the proper defendant. With regard to the relation back issue, he asserts that his original complaint explicitly referenced the Amtrak Hearing Officer and he believes Amtrak was aware of his case. He does not provide any evidence of Amtrak's awareness of his original complaint.

The Court first addresses Thompson's reasonable confusion regarding his amended complaint. While Thompson was given leave to amend his complaint, this decision did not address the statute of limitations issue. After being served with Thompson's amended complaint, Amtrak raised the statute of limitations issue in its answer and again in its motion to dismiss. When a court grants leave to amend a complaint, such a ruling does not signify that a plaintiff's amended complaint will not be dismissed for reasons highlighted by the newly named defendant.

Next, the Court addresses the language and the interpretation of 45 U.S.C. 153, First (r). This statute bars lawsuits that are filed more than two years after the date of accrual. See e.g., Gibson v. Missouri Pac. R.R. Co., 441 F.2d 784, 786 (5th Cir. 1971). The limitations period is to be strictly enforced. See Gatlin v. Missouri Pac. R.R. Co., 631 F.3d 551, 555 (8th Cir. 1980). The facts in Gatlin are similar to the facts here and the Eighth Circuit found the cause of action to be barred by 45 U.S.C. 153, First (r):

> To summarize: appellants, causes of action accrued the date Public Law Board 596 issued its decision: October 6, 1971. The two-year period of limitations in 45 U.S.C. s 153 (First) (r) applies to their claim for review of the Board's decision, against Missouri Pacific. A two-year limitations period also restricts their suit against the United Transportation Union for unfair representation.

631 F.3d at 556-57. As Gatlin demonstrates, no exceptions to the statute of limitations are made, even in situations where different defendants are named.

Finally, the Court addresses the issue of relation back. Amtrak asserts that it had no knowledge of Thompson's suit.

While Thompson's original complaint may have referenced Amtrak, this is insufficient to have given Amtrak notice of the suit. Thompson provides no evidence that Amtrak knew or should have known about his original complaint. Accordingly, the relation back theory fails.

For the foregoing reasons, this Court adopts the report and recommendation GRANTING Amtrak's motion to dismiss. It also strikes the following motions as moot: (1) Plaintiff's Motion to Oppose Delivery of Defendant's First Set of Request for Production of Documents; (2) Plaintiff's Motion to Oppose Delivery of Defendant's First Set of Interrogatories; (3) Plaintiff's Motion to Compel Discovery; and (4) Plaintiff's Motion to Adjust Case Scheduling Order. The Clerk of the Court is directed to send copies of this Order to all counsel of record, to plaintiff and to the Honorable Monica J. Benton.

DATED this ___*13th*___ day of *August* 2001.

s/ Robert S Lasnik
Robert S. Lasnik
United States District Judge

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SEP 13 2001
AT SEATTLE
CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
BY DEPUTY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

KEITH J. THOMPSON,

Plaintiff,

Case No. C99-1616L

v.

NATIONAL RAILROAD PASSENGER CORPORATION,

Defendant.

ORDER DENYING MOTION FOR RECONSIDERATION

This matter comes before the Court on plaintiff Keith Thompson's ("Thompson's") motion for reconsideration of this Court's August 13, 2001 Order Adopting Report and Recommendation that dismissed Thompson's complaint.

Motions for reconsideration are disfavored and are ordinarily denied unless the moving party can demonstrate manifest error in the prior ruling or show

new facts or legal authority that it could not have brought to the Court's attention earlier with "reasonable diligence." Local Rule 7(e). The Court applies this standard to Thompson's motion.

Thompson argues that he can demonstrate new facts that warrant reconsideration. He submits a letter from the National Mediation Board, dated August 17, 2001, four days after this Court dismissed his case. Thompson has not demonstrated that he utilized reasonable diligence and was unable to procure this letter at an earlier time.

Accordingly, Thompson's motion for reconsideration is DENIED. The Clerk of the Court is directed to send copies of this Order to all counsel of record and to Mr. Thompson.

DATED this 13th day of September, 2001.

s/ Robert S Lasnik
Robert S. Lasnik
United States District Judge

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AT SEATTLE
CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
BY DEPUTY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

KEITH J. THOMPSON

Plaintiff,

Case No. C99-1616L

v.

NATIONAL RAILROAD PASSENGER CORPORATION,

Defendant.

ORDER GRANTING MOTION TO DISMISS

I. INTRODUCTION

This matter comes before the Court on an order from the Ninth Circuit Court of Appeals. The Ninth Circuit vacated the Court's dismissal of this action and remanded the matter for determination of whether the defendant National Railroad Passenger Corporation ("Amtrak") was put on notice of the litigation and knew or should have known that it

was a proper defendant within 120 days of the filing of *pro se* plaintiff Keith Thompson's original complaint. For the reasons set forth in this Order the Court finds that Mr. Thompson failed to demonstrate that Amtrak received notice of this action within 120 days of the filing of the original complaint, and therefore Mr. Thompson's amended complaint does not "relate back" to the original complaint's filing date pursuant Fed. R. Civ. P. 15(c). Therefore Mr. Thompson's claim is barred by the two-year statute of limitations.

II. BACKGROUND

Mr. Thompson seeks review of an arbitration award issued by the Special Board of Adjustment No. 928 ("SBA") on October 14, 1997. That arbitration award upheld Thompson's discharge from his former employer, Amtrak. The Railway Labor Act provides that such actions must be initiated "within two years from the time the cause of the action accrues under the award of the division of the Adjustment Board, and not after." 45 U.S.C. 153 First (r). Mr. Thompson filed his original complaint on October 8, 1999, against the National Mediation Board (the "NMB") and the SBA. The parties do not dispute that the original complaint was filed within the statute of limitations period.

On March 31, 2000, Mr. Thompson filed a motion to amend his original complaint. This Court granted that motion on June 6, 2000. Mr. Thompson filed his amended complaint, which named Amtrak as a defendant, on July 21, 2000.

On August 13, 2001, this Court issued an order adopting Magistrate Judge Benton's report and recommendation that Amtrak's motion to dismiss be granted. The dismissal was

based upon the Court's finding that Mr. Thompson's action was barred by the two-year statute of limitations. On August 28, 2001, Mr. Thompson filed a motion for reconsideration of the Court's order of dismissal. In his motion for reconsideration Thompson argued that a letter he received from the NMB (the "NMB Letter") on August 25, 2001, demonstrated that Amtrak knew of this action within 120 days of the filing of the original complaint and therefore pursuant to Fed. R. Civ. P. 15(c) his claim is not barred. On September 13, 2001, this Court issued an order denying Thompson's motion for reconsideration on the grounds that Thompson had not demonstrated that he utilized reasonable diligence and was unable to procure the NMB Letter at an earlier time.

Thompson appealed the August 13 and September 13 Orders to the Ninth Circuit Court of Appeals. On August 19, 2002, the Ninth Circuit Court of Appeals vacated this Court's order of dismissal and remanded the matter "for a determination of whether Amtrak was put on notice of the litigation, and knew or should have known that it was a proper defendant, within 120 days of the filing of Thompson's original complaint." The Ninth Circuit's mandate was filed with this Court on October 21, 2002.

Both parties have submitted briefs regarding whether the NMB Letter demonstrates that Amtrak was put on notice of the litigation and knew or should have known that it was a proper defendant within the required time after the filing of the original complaint.

III. DISCUSSION

Fed. R. Civ. P. 15(c) provides in relevant part:

> An amendment of a pleading relates back to the date of the original pleading when

> ...
> (3) ...within [120 days], the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

If these requirements are met and the original complaint was filed within the statute of limitations period, a plaintiff may maintain an action against a defendant named in an amended complaint even if that amended complaint was not filed within the statute of limitations period. G.F. Co. v. Pan Ocean Shipping Co., Ltd., 23 F.3d 1498, 1501 (9th Cir. 1994).

Thompson's original complaint was filed on October 8, 1999. Therefore the Fed. R. Civ. P. 15(c) notice and knowledge requirements must have been met by February 7, 2000, for the amended complaint to relate back to the original complaint's filing date. [1]

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[1] February 5, 2000 is 120 days after October 8, 1999. February 5, 2000 was a Saturday. "In computing any period of time prescribed or allowed by these rules ... the last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday ... in which event the period runs until the end of the next day which is not one of the aforementioned days." Fed. R. Civ. P. 6(a). Therefore, the 120-day Fed. R. Civ. P. 15(c) period expired on Monday, February 8, 2000.

The NMB Letter, which Mr. Thompson argues demonstrates that Amtrak had notice and knowledge of the suit, states that "the NMB obtained a copy of the record of proceedings to Award No. 193 of your case from the National Railroad Passenger Corporation." (Motion for Reconsideration Ex. 2). Although the original complaint was filed on October 8, 1999, the NMB was not served until January 20, 2000. The NMB's counsel appeared in this matter on January 31, 2000. Sometime prior to the March 16, 2000 filing of the NMB's motion to dismiss, the NMB requested a record of the proceedings from Amtrak. See NMB Motion to Dismiss at 6. That record of proceedings was filed with the Court on April 5, 2000.

Mr. Thompson contends that because the NMB requested a copy of the record of proceedings from Amtrak sometime prior to March 16, 2000, Amtrak was on notice of the litigation and had real or constructive knowledge that it was the proper defendant by February 7, 2000. The plaintiff bears the burden of demonstrating that the defendant received notice of the litigation within the 120-day period for the amended complaint to relate back to the filing of the original complaint under Fed. R. Civ. P. 15(c). Slater v. Skyhawk Transp., Inc., 187 F.R.D. 185, 195 (D.N.J. 1999) ("Slater's Amended Complaint does not relate back to the date of the original complaint, because Slater has failed to demonstrate that S.D. Warren received notice of the institution of this litigation within 120 days of the filing of the original complaint."). To find that the amended complaint relates back to the filing of the original complaint, Thompson asks the Court to speculate that Amtrak received the NMB's request for the record of proceedings between January 20 and February 7, 2000, and that the request

provided notice of the litigation. The Court finds that the NMB Letter and other evidence before the Court do not demonstrate that Amtrak had notice of the litigation and actual or constructive knowledge that it was the proper defendant by February 7, 2000. Therefore the amended complaint does not relate back to the original complaint and this action is barred by the statute of limitations. See 45 U.S.C. 153 First (r).

IV. CONCLUSION

For the foregoing reasons Amtrak's motion to dismiss is GRANTED. The Clerk of the Court is directed to send copies of this Order to Mr. Thompson and all counsel of record. The Clerk of the Court is also directed to enter judgment in favor of Defendant and against Plaintiff.

DATED this *16th* day of December, 2002.

s/ Robert S Lasnik
Robert S. Lasnik
United States District Judge